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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-948

NATIONAL CABLE TELEVISION ASSOCIATION, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 464 F.2d 1313 (1972).[1] The *Re-*

[1] The decision was included as Appendix A to Petitioner's Petition for a Writ of Certiorari (hereinafter referred to as (Cert. A.)).

Materials provided in the Single Appendix with both parties agreement shall be designated as (A.), while materials at the end of the Petitioner's brief shall be designated (Pet. App.).

port and Order in Docket 18802 of the Federal Communications Commission (A.35) is reported at 23 F.C.C. 2d 880 (1970).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 21, 1972. A petition for rehearing was denied on October 2, 1972. A petition for certiorari was filed on January 2, 1973 and was granted by this Court on May 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission may recover the full cost of its regulation of the CATV industry via the imposition of annual fees on all CATV systems where those fees bear no relation to the statutory standard of "value to the recipient" or any special benefits conferred on particular CATV systems.

2. Whether the formula of allocation devised by the Commission for assessing the annual charges to individual CATV systems is discriminatory, inequitable and contrary to the statutory standards of Title V of the Independent Offices Appropriations Act.

STATUTES AND REGULATIONS INVOLVED

Title V of the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 483(a); Bureau of the Budget Circular No. A-25 of September 23, 1959; *Report and Order* in Docket 18802, in the Matter of Amendment of Subpart C of Part 1 of the Commission's Rules relating to fees, 23 F.C.C. 2d 880 (1970); and the *Memorandum Opinion and Order* denying reconsideration,

28 F.C.C. 2d 139 (1971), set forth in the Appendix to this brief.

STATEMENT OF THE CASE

Petitioner, National Cable Television Association, Inc. (hereinafter NCTA) is the national trade association for the CATV industry and in that capacity represents the majority of CATV systems in the United States. NCTA seeks review of the decision of the United States Court of Appeals for the Fifth Circuit holding that the Federal Communications Commission's annual schedule of fees imposed on CATV systems in 1970 is a reasonable exercise of the authority delegated to the Commission by Congress.

On February 19, 1970, the Federal Communications Commission (hereinafter FCC or Commission) released a *Notice of Proposed Rulemaking* in Docket 18802, 21 F.C.C. 2d 502 (1970) (A-1), in which it proposed to radically revise its then existing fee schedule for persons subject to its jurisdiction.[2] As proposed in the *Notice,* CATV systems, for the first time, would be included in the Commission's schedule of fees. These fees would include filing fees and a significant annual fee for CATV systems. As authority for the new filing fees and annual fee schedule related to CATV systems, the Commission cited Title V of the Independent Offices

[2] In its *Report and Order* in Docket 14507, 25 Pike & Fischer, R.R. 1559 (1963), the Commission had provided for a schedule of filing fees which became effective on March 17, 1964. The fees established therein were limited to charges established for voluntary filing of applications for television and radio stations, common carrier services, safety and special services, and commercial and amateur radio licensing. They amounted to approximately 25 percent of the Commission's budget. CATV was not included at that time.

Appropriations Act of 1952, 65 Stat. 290; 31 U.S.C. § 483 (a).

The Commission admitted the newness of its proposed fee approach, stating:

> The fee schedule being proposed herein represents a departure from the existing schedule in several major respects. The present schedule is limited to nominal fees upon the filing of applications for various types of authorizations for radio stations, operators' licenses, and communications common carriers. The approach in the newly proposed fee schedule, in addition to imposing fees in various areas where none now exist, is more closely and literally tied to the criteria stated in the above-cited Appropriations Act. Thus, the proposed fees are designed to make the Commission "self sustaining to the full extent possible. . . ." in the work and services it performs in the granting of licenses, authorizations, privileges, benefits, and similar things of value. (A. 4).

The Commission further declared that the rationale for the formulation of the new fee schedule gave explicit recognition, in appropriately varying degrees, to the "value to the recipient" of the privileges granted, as well as the public interest served and the "direct and indirect cost to the Government."[3]

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[3] These are the legal criteria for determining agency fees as contained in Title V of the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 483(a). This law provides the statutory authorization for the promulgation of fee schedules by an administrative agency. Acting under the provisions of the Appropriations Act, the Bureau of the Budget issued its Circular No. A-25 on November 5, 1953, which directed agencies to establish policies to "provide a system of fair and equitable fees which, taking account of the value to the recipient and the public policy and interest served, shall recover, to the full extent possible, the aggregate cost incurred in the conduct of these activities." S. Report 1467, 84th Cong., 2nd Sess. 7 (1956). The Bureau revised Circular No. A-25 which it reissued September 23, 1959.

NCTA, and other interested parties, complained to the Commission that it was virtually impossible to submit cogent comments to the *Notice* on the annual fee proposals because of the paucity of information about how the statutory considerations, particularly "direct and indirect cost" and "value to the recipient," were incorporated in the proposed new CATV annual fees. In response to this request the Commission released a *Supplemental Notice.*[4] (A. 30).

On March 2, 1970, NCTA requested from the Executive Director of the Commission the right to inspect seven classes of documents in the Commission's files under the Freedom of Information Act of 1966, 5 U.S.C. § 552 (1966), and Section 0.461 (a) of the Commission Rules and Regulations, 47 C.F.R. 0.461 (a). The most important category of information requested was "the documents, listings and records, used to determine value to the recipient of the privileges granted" as referred to by the Commission in the *Notice.* The other categories all related to the factual support for the "cost" considerations in the Commission's proposals. NCTA made clear that it planned to use the requested documents and records in preparing its written comments on the proposed CATV fees.[5] (Pet. App. 3a)

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[4] While the Commission declared that the *Supplemental Notice* "contains information as to the costs of the Commission's various activities," the *Supplemental Notice,* in fact, only contains a single line providing an overall dollar and percentage cost figure for the Commission's regulation of the CATV industry.

[5] On March 25, 1970, the Commission's Executive Director denied access to each request. (Pet. App. 5a) NTCA's request for the FCC's budgetary estimates for fiscal years 1969, 1970, and 1971 was denied, and NCTA was referred to the Bureau of the Budget. No answer was given to the request for the supportive documents used to prepare the FCC's budgetary request for the fiscal year 1971. While referring to Section 0.451(b) (3) of the

In denying NCTA's request for access to the documents used to determine value or benefit to the CATV industry from Commission regulation the Commission's Executive Director stated:

> With respect to the value to the recipient of the privileges granted, the Commission and its staff relied upon their knowledge of the financial aspects of the communications industry acquired over the years from a vast number of confidential financial statements, confidential staff memoranda and various trade publications. Consequently, your blanket request to inspect all of this information must be denied because it cannot be identified and assembled without totally unreasonable expenditures of Commission manpower. (Pet. App. 5a-6a).

Following the Commission's total denial of NCTA's petition to review the Executive Director's decision on April 16, 1970,[6] NCTA brought suit against the Commission in the United States District Court for the District of Columbia on May 1, 1970 under the Freedom of Information Act, 5 U.S.C. § 552, asking that court to affirm NCTA's right to inspect the documents requested.[7]

FCC Rules as the basis for their denial of some requests, the FCC failed to forward the request to the Bureau of the Budget as required by their own regulations. In response to NCTA's request for the documents, listings and records, used to determine the "direct and indirect cost to the Government," the FCC said it would provide nothing more than its *Supplemental Notice* released March 4, 1970. The Executive Director also totally denied NCTA's request for the documents, listings and records used to determine the "value to the recipient of the privileges granted."

[6] *Memorandum Opinion and Order* in Docket 18802 (A. 32).

[7] On the same day, NCTA filed with the FCC a "Petition to Stay" the fee schedule which was denied on April 30, 1971. (A. 140)

On May 21, 1970, after the FCC's rulemaking proceeding was closed, the Commission filed with the District Court a Motion to Dismiss or in the Alternative for Summary Judgment and an accompanying affidavit of its Executive Director.[8]

The District Court held two hearings on the motion at which the Commission's Executive Director testified to both the nonexistence of the requested documents relating to value or benefit and a claim that, in any event, any such documents that did exist were confidential. On July 31, 1970, following the hearings, the District Court, through an oral ruling from the bench, granted the Commission's Motion for Summary Judgment.[9]

While the controversy over the Commission's denial of the requested information continued, the Commission issued its *Report and Order* in Docket No.

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[8] The Executive Director's affidavit simply alleged that circumstances had changed since the original denial which made it possible for NCTA to inspect the documents used to prepare the annual inventory report for 1969. Also offered for inspection were the FCC's budget estimates submitted to the Congress for the years 1969, 1970 and 1971. The Commission continued to maintain that the documents used to arrive at "direct and indirect cost" and "value to the recipient" were not available for review.

[9] On October 1, 1970, NCTA filed an appeal with the United States Court of Appeals for the District of Columbia Circuit. NCTA argued, among other things, that the Commission's bare declarations as to lack of possession of the requested documents related to both "direct and indirect costs" and "value to the recipient", accompanied concurrently by claims that the same documents were exempt was an improper basis for the District Court's decision.

18802 on July 1, 1970, establishing its new fee schedule, 23 F.C.C. 2d 880.[10] (A. 35).

The Commission admitted in its *Report and Order* that the new fee schedule, including the imposition of annual fees, differed significantly from the prior fee schedule and that the fees adopted were clearly calculated to permit the Commission to sustain its entire annual budgetary request. (A. 37-38).

The *Report and Order* established the following general categories of fees (47 C.F.R. 1.1101-1.1120): First, the fees in Docket 14507, *supra*, for filing applications for radio stations, radio operator licenses or common carrier activities, were generally increased; second, a new charge was levied for grants of broadcast license applications in addition to the filing fee; third, an annual charge was imposed upon broadcast stations and common carriers; fourth, the Commission imposed for the first time a schedule of fees on CATV system operators.

The new CATV fees were divided into two categories. First, filing fees were imposed in connection with Commission-mandated notices filed by CATV systems regarding the carriage of television stations, and petitions filed by CATV systems seeking the waiver of or relief from Commission regulations. 47 C.F.R. 1.1116(a). Second, an annual charge was imposed on

[10] The Commission rejected all arguments against the principle of the annual CATV fee. The Commission's schedule of CATV fees, with two exceptions, remained identical to those set forth in the *Notice of Proposed Rulemaking*. The modifications made were adverse to the industry. The Commission in its *Report and Order*, changed one special filing fee and eliminated from its proposal the exemption of small CATV systems from the annual fees. (A. 64-65)

all CATV systems calculated at the rate of 30 cents per system subscriber. 47 C.F.R. 1.1116(b).[11] The annual assessment was levied to recoup the Commission's full CATV regulatory appropriation from Congress without regard to whether any work or other benefit had been performed for a particular CATV system during that year.

Based on the Commission's estimate of 3,750,000 subscribers in the CATV industry in fiscal year 1969-70, the Commission expected to recover $1,125,000 from CATV operators in annual fees in the first year.[12]

The Commission's annual CATV fees were expected to recover in excess of 95% of total fees collected from the CATV industry. The remainder was to come from the aforementioned filing fees. Total fees from CATV in the first year were estimated at approximately $1,150,000.[13]

Following the Commission's denial of reconsideration of its *Report and Order,*[14] NCTA and the Cali-

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[11] This annual fee would rise to 40 cents per subscriber under a new fee schedule proposed by the Commission on December 27, 1972 in the *Notice of Proposed Rule Making* in Docket 19658. 38 F.C.C. 2d 587 (1972).

[12] On January 1, 1973 estimates show, the industry had over 7,000,000 CATV subscribers.

[13] The effective date of both the filing and annual CATV fees was set at August 1, 1970. Under Section 1.1116(a), 47 C.F.R. 1.1116(a), all applications, petitions and notices received on and after August 1, 1970, were subject to the new fees.

[14] On April 1, 1970, the Commission issued a *Memorandum Opinion and Order,* 28 F.C.C. 2d 139 (1971), denying a petition for reconsideration directed against the CATV annual fee schedule filed on behalf of approximately 200 existing or currently proposed CATV systems. (A. 89)

fornia Community Television Association, Inc., along with several interested broadcast parties, sought judicial review of the Commission's new fee schedule. NCTA's principal argument was that the criteria established in Title V of the Independent Offices Appropriations Act did not provide the authority for the imposition of annual fees against the CATV industry. All of the appeals were consolidated in the United States Court of Appeals for the Fifth Circuit. In a decision rendered on July 21, 1972, in *Clay Broadcasting Corp.* v. *Federal Communications Commission*, 464 F. 2d 1313, that court upheld the Commission in all respects. (Cert. A-1). With particular reference to the imposition of an annual fee on CATV systems, the court concluded that CATV benefits from the Commission's regulation of CATV differently than the public at large, this being sufficient to justify the imposition of the annual fee.[15]

NCTA filed a petition for a writ of certiorari with this Court on January 2, 1973.

On April 17, 1973, the Court of Appeals for the District of Columbia reversed the Freedom of Information decision of the United States District Court in *National Cable Television Association, Inc.* v. *Federal Communications Commission*, No. 24,786, (C.A.D. C.). The Court held that the Commission must specify what documents it has supporting both the Commission's 1970 CATV budget request to Congress and those related to the determination of the benefit or "value to the recipient" of the Commission's CATV regulation if they exist. Those documents

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[15] NCTA's petition for rehearing to the Court was denied on October 2, 1972.

which exist would have to be made available unless the District Court found them to be within the limited exemptions of the statute.[16]

The Court found that the Commission's *Notice of Proposed Rulemaking* in 1970 was inadequate on its face for the purpose of determining the factors of "value to the recipient" and "direct and indirect cost" required under the Appropriations Act. (Supp. App. 5-6).

SUMMARY OF ARGUMENT

The sole statutory authority for the imposition of fees by the Federal Communications Commission is contained in the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 483(a). That statute, as interpreted by the Budget Bureau Circular No. A-25 of 1959, permits a fee to be charged where there is an "identifiable recipient" of a "measurable unit" of service from which he obtains a "special benefit." Furthermore, the Act requires that the fee itself must be determined on the basis of "direct and indirect cost to the Government, value to the recipient, [and] public policy or interest served." (A. 151) The Commission's imposition of an annual fee of 30 cents per subscriber on all CATV systems in the country fails virtually every one of these requirements.

The Commission's regulation of the CATV industry provides no "special benefit," and certainly not to an "identifiable recipient." Since the Commis-

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[16] As a result of this decision NCTA, on April 27, 1973, filed a Supplement to its Petition for a Writ of Certiorari with this Court. This decision is included as a Supplementary Appendix to Petitioner's Supplement to Petition for Writ of Certiorari, (hereinafter referred to as (Supp. App.).

sion first began regulating some phases of CATV in 1965, the principal thrust of the regulation has been the protection of television broadcasters. This "ancillary" assertion of jurisdiction has been wholly restrictive in nature. A CATV system does not need Commission authority to operate. This permission is granted at the local level for which annual franchise fees are generally paid. The argument that an economic climate is created is clearly insufficient since the public at large benefits rather than an "identifiable recipient" of a "special benefit." This is the crux of the decision of the Court of Appeals for the District of Columbia in *New England Power Co.* v. *Federal Power Commission*, 467 F.2d 425 (D.C. Cir. 1972)[17] overturning an analogous annual fee imposed by the FPC.

Even if some "special benefit" to CATV systems is assumed for the sake of argument, the requirement of an "identifiable recipient" is fatal to the annual fee for two reasons. First, the bulk of CATV systems makes no request or filing with the Commission in the course of a year, and thus a specific, identifiable CATV system receives no "measurable unit" of service such as a license, permit, or certificate. Second, the annual fee is imposed on all CATV systems on the basis of number of subscribers and is therefore completely unrelated to what specific work, if any, was done for a particular CATV system. These are the obvious distinctions from the Commission's principal case authority, *Aeronautical Radio, Inc.* v. *FCC*, 335 F.2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965), where the court sustained filing fees imposed on applicants for permits.

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[17] The decision was included as Appendix D to Petitioner's Petition for a Writ of Certiorari (hereinafter referred to as Supp. App. D).

In addition, the Commission has failed to properly consider the factor of "value to the recipient" in setting the annual fee in its overriding effort to recover all of its costs of regulation. The Commission's formula was simple. It involved estimating the direct and indirect cost of regulating CATV, deducting from that estimate the revenues received from filing fees and dividing the remaining costs among the total number of CATV subscribers to reach a 30 cent per subscriber annual fee. Furthermore, the amount paid is determined not by "value" or "special benefit" received from the Commission but upon the number of subscribers and hence upon the CATV system's gross receipts. Therefore, the annual fee, in its present form, is an illegal tax.

ARGUMENT

I. TITLE V OF THE INDEPENDENT OFFICES APPROPRIATIONS ACT DOES NOT AUTHORIZE THE FEDERAL COMMUNICATIONS COMMISSION'S IMPOSITION OF AN ANNUAL CATV ASSESSMENT WHEN NO SPECIAL BENEFIT TO AN IDENTIFIABLE RECIPIENT HAS BEEN PROVIDED.

A. The Commission's Authority To Assess Fees Is Limited

The Commission's *Report and Order* for the first time, established the payment of fees by CATV systems filing certain requests and notices. NCTA, in its comments to the Commission, did not question the Commission's authority to establish reasonable filing fees.[18] However, the Commission also assessed an annual fee of 30 cents per subscriber on all CATV sys-

[18] The filing fees imposed by the Commission for the processing of the various special relief applications, notifications and petitions may not necessarily relate to the total actual cost associated with the provision of a service to the particular CATV applicant. The comments of the CATV industry did complain at the time of the issuance of the *Notice of Proposed Rulemaking* that it was the first time the Commission had imposed a charge for a request for relief from general restrictive regulations.

tems. The Commission relies on the Independent Offices Appropriations Act of 1952, 65 Stat. 290, 31 U.S.C. § 483a, (hereinafter Appropriations Act) in imposing these annual fees. (A. 151) The Appropriations Act is the sole statutory basis for the Federal Communications Commission's authority to impose fees. The Communications Act of 1934 itself does not authorize the assessment of any Commission fees.[19]

No authority exists in the Appropriations Act for the Commission to exact its annual 30 cent per subscriber fee on all CATV systems.[20] The charging of fees is legitimate only when the following conditions exist: first, the regulatory agency must provide some specific thing of value, *i.e.*, "any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration or similar thing of value or utility"; and second, this

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[19] In one limited instance, Section 4(f) (3), 47 U.S.C. § 154(f) (3), requires ship owners to pay for certain overtime services by Commission engineers.

[20] The Appropriations Act provides in pertinent part as follows:

"It is the sense of the Congress that any *work, service,* publication, report, document, benefit, privilege, authority, use, franchise, *license,* permit, certificate, registration, *or similar thing of value or utility performed,* furnished, provided, granted, prepared, or issued *by any Federal agency . . . to or for any person . . . shall be self-sustaining to the full extent possible* and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the president may prescribe) to prescribe therefor such fee, charge, or price, *if any,* as he shall determine in case none exists, or redetermine in case of any existing one, *to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . .*" (Emphasis added). (A. 151)

"value" must be provided to or for a specific or identifiable person. It cannot be to the public generally. The Commission's annual fee for CATV systems fails to meet either of these conditions. The Commission's clear primary objective in promulgating the new fee schedule is to obtain revenues from CATV systems which would approximate the total amount of its CATV budget requirements. However, total subsidization is not a statutory criterion for establishing a fee schedule. The directive "to the full extent possible" cautions that the Commission is limited by the true criteria established under the statute regardless of any general desire to obtain total subsidization of its CATV activities.[21]

The Appropriations Act provides that agency fees "shall be uniform as practicable and subject to such policies as the President may prescribe." In 1953, following the enactment of the Appropriations Act, the Bureau of the Budget issued its first Circular No. A-25 in an effort to interpret the provisions of the Appropriations Act. After several revisions it was reissued on September 23, 1959, and stands today as the current set of guidelines for the Appropriations Act. (A. 142).

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[21] The legislative history of the Appropriations Act evidences that the Congress did not intend to confer upon federal agencies the power to levy charges on persons who were simply subject to its jurisdiction. The House Appropriations Committee, in reporting the Appropriations Act, stated that the motivation for authorizing federal agency fees resulted from the fact that the government "is not receiving full return from many of the services which it renders to *special* beneficiaries." (Emphasis added). H.R. Rept. 384, Committee on Appropriations, 82nd Cong., 1st Sess. 2 (1951). The Senate imposed the same guidelines. S. Rept. 2120, Committee on Expenditures in the Executive Departments, 81st Cong. 2nd Sess. (1950).

The Bureau of the Budget Circular No. A-25 (hereinafter "Circular") established that the "responsibility for the initiation, development, and adoption of schedules of charges and fees consistent with the policies of this Circular continues to rest with the agency. Each agency shall:

a. Identify the services or activities covered by this Circular;

b. Determine the extent of the special benefits provided;

c. Apply accepted cost accounting principles in determining costs;

d. Establish the charges; and

e. In determining the charges for the lease and sale of Government-owned resources or property, apply sound business management principles and comparable commercial practices." (A. 144).

Thus, the initial steps in the Circular require each agency, in formulating its fees, to identify the covered services or activities and to determine the special benefits provided by the agency. The Commission steadfastly maintains that the annual fee had been prepared in the light of these Executive and Congressional directives. (A.3, 38). Perhaps the Commission should not be expected to identify each of its respective cost for each CATV system which pays the annual fees, but neither the Commission's *Notice of Proposed Rulemaking, Supplemental Notice* nor *Report and Order* identifies which, if any, services or special benefits to particular CATV systems or even to the CATV industry as a whole are rendered in return for the payment of the annual fees. Compliance with that obliga-

tion would seem to be particularly necessary in the case of annual fees where no relationship to any agency service is apparent as might be the case with a filing or grant fee. The agency is required to identify the special benefits since the Circular also emphasizes that "special benefit" or "value" is critical to the assessment of fees by an agency.[22]

At the same time, the Circular states that only regulation providing these special benefits to *identifiable beneficiaries* justifies the imposition of charges (A. 143). This requirement is expressed throughout the

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[22] 3. General Policy: A reasonable charge, as described below, should be made to each identifiable recipient for *a measurable unit or amount of government service or property from which he derives a special benefit.* (Emphasis added).

a. *Special Services:*

(1) Where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Government of rendering that service. For example, a special benefit will be considered to accrue and a charge should be imposed when a government rendered service:

(a). Enables the beneficiary to obtain more immediate or substantial gains or value (which may or may not be measurable in monetary terms) than these which accrue to the general public (e.g., receiving a patent . . .); or

(b). Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificate of necessity and convenience for air line routes . . .); or

(c). Is performed at the request of the recipient and is above and beyond the services regularly received by the other member of the same industry or group, or of the general public (e.g., receiving a passport, visa or airman's certificate . . .) (A. 143)

Circular in both the "Coverage" and "General Policy" sections.[23]

Thus, the Appropriations Act, as further clarified by the Circular, authorizes the Commission to impose fees only to recover the costs of rendering a service providing value or benefits to identifiable beneficiaries beyond the benefits obtained for such service by the general public. The Commission in levying its annual CATV fee failed to meet these standards.

B. The Commission's Regulation of CATV Provides No Special Benefits to CATV Systems

In *New England Power Company* v. *Federal Power Commission, supra,* the Federal Power Commission assessed flat filing fees and an annual charge against electric power and natural gas pipeline companies under its jurisdiction. The fee schedule called for the FPC to determine the regulatory costs of its programs and then to subtract the revenues raised from the filing fees. (Cert. D-4). The remaining cost was recovered by annual fees levied against each company

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[23] 2. [T]he provisions of this Circular cover all Federal activities which convey special benefits *to recipients alone and beyond those accruing to the public at large.* (emphasis added) (A. 142).

And:

3. A reasonable charge, as described below, should be made to *each identifiable recipient* for a measurable unit or amount of Government service or property from which he derives a special benefit. (emphasis added). (A. 143).

And:

3(a)(2) No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public (e.g., licensing of new biological products). (A. 143-144).

in proportion to the amount of jurisdictional gas deliveries (or power sold) by the company as a ratio of the total sold by all the jurisdictional companies. (Cert. D-4, 5).

The FPC, in defending its fee schedule, contended that its charges came within the Circular's terms because the charge related to the cost incurred in discharging its "responsibilities in preventing the imposition of rates and charges which are unjust and unreasonable or preferential and prejudicial" and while such regulation "has provided continuing benefits to consumers," it has also:

> redounded to the benefit of both industries by creating the economic climate for greater usage of the services of the regulated companies which in turn have further strengthened their financial stability and their ability to sell debt and equity securities required for capital additions to meet ever-increasing demands. (Cert. D-8).

The court in *New England Power Company* completely rejected this argument. It noted that the creation of an "economic climate" is not a special service nor is a particular company the "special beneficiary" of such a climate any more than any other company or the consumer in general.

The Court concluded that the regulation of the gas and power companies was primarily for the benefit of the public and therefore that:

> *There is something fundamentally wrong in assessing charges on the basis of benefit to the company when the Commission must benefit the public.* In the absence of Congressional mandate to the contrary, we conclude that monies for the administration of programs benefitting the general public should come from the general fund of the treasury. (Emphasis added). (Cert. D-9).

In both *New England Power Co.* and the instant case the special benefits to identifiable recipients are obscure. In fact, unlike the gas pipeline companies who receive a certificate of convenience and necessity as operating authority from the FPC, CATV operators receive such authority at the local level.

Commission regulation of CATV has resulted in little, if any, benefit even to the CATV industry as a whole. There is not even the beneficial "economic climate" found by the court in *New England Power Co.* to be insufficient as the needed statutory benefit. Since the *First Report and Order*, 38 F.C.C. 683 (1965), regulating microwave-fed CATV systems and the *Second Report and Order*, 2 F.C.C. 2d 725 (1966), regulating all CATV systems, the Commission's regulation of CATV has had as its objective the economic protection of the television broadcaster to the economic detriment of the CATV industry.

This Court's decision in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), succinctly describes the Commission's CATV regulation under the *First Report and Order* and *Second Report and Order, supra*:

> First, CATV systems were required to transmit to their subscribers the signals of any station into whose service area they have brought competing signals. Second, CATV systems were forbidden to duplicate the programming of such local stations . . . (See generally, *First Report and Order*, supra, at 719-730). These carriage and non-duplication rules were expected to "insure many stations ability to maintain themselves as their areas' outlets for highly popular network and other programs" Id., at 715 . . . After futher hearings the Commission held that the act confers adequate regulatory authority over all CATV systems. *Sec-*

ond Report and Order, supra, at 728-734. It promulgated revised rules, applicable both to cable and to microwave CATV systems, to govern the carriage of local signals and the non-duplication of local programming. Further, the Commission forbade the importation by CATV of distant signals into the 100 largest television markets, except insofar as such service was offered on February 15, 1966, unless the Commission has previously found (in evidentiary hearings) that "it would be consistent with the public interest . . . particularly the establishment and healthy maintenance of television broadcast service in the area. Id., at 781-785; 47 C.F.R. § 74.1107(c). Finally the Commission created "summary non-hearing procedures for the disposition of applications for separate or additional relief. 2 F.C.C. 2d at 764; 47 C.F.R. § 74.1109."; *U.S.* v. *Southwestern Cable Co.*, 392 U.S. at 166-67 (1968).

Since *Southwestern* the Commission has continued to regulate CATV as "reasonably ancillary to the effective performance of the Commission's responsibilities for the regulation of television broadcasting." The Commission, urged by the broadcast industry to impose a "freeze" on all CATV construction, accomplished this result on December 13, 1968, in its *Notice of Inquiry and Proposed Rulemaking* in Docket 18397, 15 F.C.C. 2d 417 (1968). Foregoing its evidentiary hearing process, the Notice immediately imposed a procedure of "retransmission consent."[24] These procedures were in effect for over three and one-half years and for the entire time television stations refused to grant such consent.

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[24] CATV systems, in order to carry more than local television signals, were required to obtain "retransmission consent" directly from the distant television broadcast stations on a program by program basis. *Notice*, 15 F.C.C. 2d at 432.

On July 21, 1971, over two and one-half years after the freeze began, the Chairman of the Commission himself in testimony at Congressional hearings politely characterized the horrendous effect of retransmission consent on the CATV industry:

> After two-and-a-half year's experience we now recognize that cable systems cannot develop on the basis of retransmission consent. Thus, the net effect has been to delay consideration of most proposals for new cable systems. *Statement of Dean Burch, Chairman, before the Communications Subcommittee of the House Committee on Interstate and Foreign Commerce*, p. 11.

The Commission in June 1970, issued its so-called proposed Public Dividend Plan in a *Second Further Notice of Proposed Rulemaking* in Docket 18397A, 24 F.C.C. 2d 580 (1970).[25] The Commission, in part, proposed that CATV systems pay five per cent of gross income to educational television stations and that local UHF stations be permitted to insert their advertising on the television signals imported by CATV systems.

The United States Department of Justice, commenting on the Commission's proposals, put its finger on the essence of the Commission's CATV regulation:

> *The Commission candidly admits that it is searching for "an approach to this distant signal problem which will affirmatively assist the elements of broadcasting most requiring aid-* the independent UHF station and the public broadcasting system (ETV)—and will do so in a way which can be fair to the copyright owner and will not under-

[25] This *Second Notice* was supported in some respects by the CATV industry as a last resort to break the freeze.

> mine the healthy operation of all other stations in these markets. (*Second Notice*, para. 4)."
>
> Two premises pervade the Commission's analysis and proposals with respect to importation of distant signals, not only in this immediate proceeding, but throughout its consideration of CATV problems: The first is that television broadcasters are being subjected to "unfair competition" from CATV operators; and the second is that there is a public interest in preserving marginal television and restrictions aimed at CATV. We submit that both of these are incorrect as a matter of policy. (Emphasis added). Comments at 4.

There has been further criticism by the Justice Department of the Commission's regulation barring to a great extent pay-cable-casting by CATV systems. On May 3, 1971, the Justice Department filed a Memorandum in Support of Petitions for Reconsideration of the Commission's *First Report and Order*, in Docket 18397, 20 F.C.C. 2d 201 (1969). The rationale for the regulatory prohibitions said Justice, "is plainly stated to be protection against loss of over-the-air broadcast programming ("siphoning")." Memorandum at 2.[26]

NCTA recited to the Fifth Circuit the adverse effects of the Commission's CATV regulation, prior to,

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[26] Recognizing the ancillary nature of CATV regulation, the Justice Department argued at length against the Commission's protective policies and concluded:

> To relegate an emerging mode of electronic communication to a role in which it may not develop to the full extent of its economic potential is clearly an important and far-reaching decision. In the absence of a Congressional mandate, therefore, the enforcement of a regulation so restrictive of CATV cablecasting as to handicap its growth and development conflicts, we think, with expressed Congressional policy favoring competition and favoring the full development of the inherent potential of all modes. Memorandum at 11.

during and subsequent to the promulgation of the annual fee schedule at issue. The court in *Clay* noted that but stated that under the Appropriations Act it is not relevant whether the regulated industry likes the regulation, but whether the industry benefitted in a manner different from the public at large. (Cert. A-18)

The Fifth Circuit may be correct that the statute does not require that an industry approve of regulation before fees can be charged. But the court's list of "valuable benefits" that the industry has received misses the point entirely. The regulatory history of CATV regulation has simply not been designed to "benefit" the CATV industry as a whole nor is there any benefit "to or for any person" as required by the Act or to an identifiable recipient as specified by the Circular. *See, New England Power Co., supra.*

The Fifth Circuit concluded that "benefits" flow to the CATV industry as a result of its broadcast regulation. The Court cited the scarcity of television outlets which exists under the Commission's *broadcast* regulations and which creates much of the economic value attached to distant signals imported by CATV.[27] (Cert. A-18)

Any benefit the CATV industry receives from the Commission's regulation of broadcasting is purely derivative and incidental, thus clearly insufficient for imposing fees. This incidental connection is the vital difference between the broadcast regulatory scheme and the CATV regulatory scheme. In addition, broadcasters receive a valuable monopoly from the Commis-

[27] It is important to note that many CATV systems do not even carry distant signals.

sion in the form of a license, without which they cannot go into business. The CATV annual fee cannot be levied on CATV systems under the Appropriations Act on the basis of this tenuous connection.

The Executive guidelines confirm the failing of the Commission's action. None of the Circular's standards of "value" or "special benefit" to an identifiable beneficiary are found in the Commission's regulation of the CATV industry.

Under the criteria established in 1(a) of the Circular, (A. 143), the CATV industry, through Commission regulation, does not obtain "more immediate or substantial gains or value," either monetary or nonmonetary, as a result of Commission jurisdiction. The Commission neither grants a monopoly nor the use of the limited public spectrum to a CATV system. A CATV system is not protected from competition by the Commission as are the broadcasters and telephone common carriers. There is no need for the Commission to grant rights of way, exclusive territory or other benefits. Any rights acquired by the industry are obtained and paid for by franchise fees and other compensation at the municipal or state level.

Under the criteria established in 1(b) of the Circular (A. 143) the Commission's regulation of CATV since its inception has hardly been the kind to provide "business stability" or assure "public confidence" in the business activity of the cable television industry. The Commission's own acknowledged restrictive policies have destroyed the CATV industry's research and development and impaired the industry's progress and stability.

Finally, under the criteria established in 1(c) of the Circular (A. 143) the Commission's initial assump-

tion of jurisdiction was not sought by the CATV industry but was imposed at the request of the television broadcasters. CATV systems pay filing and application fees when requesting specific relief from the regulations. Many existing systems, currently providing full services, have never had to contact the Commission. Their contact will be the periodic filing of burdensome reports for the Commission's benefit.

Nor can the Commission find support for its new annual fee schedule in *Aeronautical Radio, Inc.* v. *Federal Communications Commission*, 335 F. 2d 304 (7th Cir. 1964), *cert. denied*, 379 U.S. 966 (1965) (A. 41). That case is inapposite. At issue in *Aeronautical Radio* was the Commission's *Report and Order* in Docket 14507 which levied nominal *filing fees* on applications for broadcast stations *licenses*, radio operator *licenses*, and for *certificates* for common carrier operations. Radio and television stations obtained valuable licenses to use public resources from the Commission. Common carriers obtained certificates of public convenience and necessity from the Commission insulating them against competition from other carriers and providing them with a guaranteed rate of return.

The 1963 fee schedule was affirmed on the basis of of the Appropriations Act's specific reference to licenses and certificates. The special benefits here were clear. The imposition by the Commission of the new annual fee schedule on the CATV industry is far more than just adding a new industry to the list of the assessed. It alters the basis of past agency schedules from an application and filing fee system to a system largely based on a levy against gross revenues of all CATV systems. The basis found to be proper for agency fees in *Aeronautical Radio* has been discarded.

Yet the Commission attempts to manipulate the philosophy of *Aeronautical Radio* to support its CATV annual fee. The Commission argues that because CATV is so simliar to other services which, in fact, the Commission authorizes and included in its first fee schedule, it should likewise be included in the new fee schedule, and charged not only filing fees but also an annual fee of substantial magnitude. In continuing this feint the Commission in its *Report and Order* avoids giving any specific indication of the beneficial services provided.

A CATV system is characterized as "the subject of Commission regulation and which, directly or indirectly receives what, in effect, is a *Commission authorization tantamount to a license.*" (Emphasis added) (A.41). The modifiers "directly or indirectly," "in effect" and "tantamount to" in the Commission's own self-serving declaration hint at the tenuous nature of the Commission's conclusion. The Commission's characterization of its CATV regulation as "general authorization to provide this interstate communications service" and its bootstrapping of the CATV fee schedule is an attempt to put a square peg in a round hole. The "authorization" which is described as "tantamount to a license" is designed to restrict CATV systems ' competitive status with the television broadcast industry.[28] The Commission did not license CATV sys-

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[28] Even a licensed entity must receive a "benefit" in connection with the assessment of a fee. The annual fees overturned in *New England Power Co., supra,* were being levied against the licensee natural gas companies. The court still concluded there was the lack of necessary "benefit" related to the annual fee.

tems at the inception of its CATV schedule, nor does it do so today.[29]

An explicit contradiction of the Commission's conception of its CATV regulation for purposes of serving as a basis for its annual fees is found in a dialogue between Senator John Pastore, Chairman of the Senate Subcommittee on Communications, and Commission Chairman Dean Burch during hearings on June 15, 1971:[30]

> Senator Pastore: In other words, before a CATV can become operative, he has to apply in some form to the FCC?
>
> Mr. Burch: Yes. We do not—at the present time we do not issue a license: "The FCC authorizes the Midwest Video Company to do something." What they have done is complied with our rules that are applicable.
>
> Senator Pastore: *Can they not do that without consulting you?*
>
> Mr. Burch: *Yes.*
>
> Senator Pastore: *In other words, you formulate and prescribe but they do not have to bother with you at all?*

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[29] A new set of cable rules was made effective March 31, 1972. Cable Television *Report and Order*, 36 F.C.C. 2d 143 (1972). Under these rules, new CATV systems must obtain a certificate of compliance from the Commission before they can commence operations. But basic operating authority still comes first from the local franchise, and then the Commission looks over the proposed operation solely for consistency with the Commission's rules. In any event, this certification requirement comes two years after the fee schedule took effect and the great majority of existing systems will not have to obtain such a certificate until 1977.

[30] Hearings before the Subcommittee on Communications of the Committee on Commerce, 92nd Congress, 1st Sess. at 87-88 (1971).

Mr. Burch: *They have to pay a fee every year. They have to be on our mailing list, and things of that nature.*

* * *

Senator Pastore: *The broadcaster has to get a license. They (CATV operators) are the people who do not have to do anything but subscribe to a rule; all they have to do is abide by the rules but do not come to you for a license or grant, and yet you want a fee—for doing what?*

Mr. (Commissioner) Johnson: They are only paying 30 cents; they are only getting 30 cents worth.

(Laughter)

Mr. Burch: I will tell you what they are paying for. They are paying for a bureau which has probably grown 20 times. It is now 27 people and it started with about one. That costs a *substantial portion of our budget each year, and there is no way of allocating that to the cable interests other than on a subscriber basis.* (Emphasis added).

Chairman Burch's responses and Senator Pastore's reaction provide a common sense rejection of the Commission's rationale for its annual CATV fee.

CATV systems do not obtain their right to operate from the Commission. Local governments and, in some cases, state governments provide the appropriate permits and franchises which serve as the authorization for CATV services.[31] As long as minimum notice to

[31] Unlike broadcast services and common carrier services, the CATV system in return for the permit to operate in a particular community already pays an annual percentage fee or gross receipts tax to the local community. This annual percentage payment has been increasing rapidly and averages from 3-7% of the CATV system's gross revenues.

television broadcasters was given by the CATV franchise holder,[22] the Commission at the time of the promulgation of its fee schedule could not prevent CATV operation.

In view of the foregoing, the Commission's limited regulation of a CATV system cannot be puffed into regulation "tantamount to a license" or a "general authorization to provide this interstate communications service," which is of special benefit to an identifiable CATV system.

Assuming, *arguendo*, that present Commission regulation of CATV is beneficial to the public at large, such public benefit is not the kind of "value" or "special benefit" to an identifiable recipient necessary for recouping the Commission's total regulatory costs for its CATV regulation via annual fees.[23]

The Fifth Circuit's focus on the Commission's prohibitions designed to restrict ownership of CATV sys-

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[22] Under the Commission's 1970 regulations, a CATV system beginning operation gave notice to each television broadcast station in whose area the system proposed to operate. A copy of such notice was forwarded to the Commission. Unless a broadcaster objected, the system could begin operation. 47 C.F.R. § 74.1105. Section 1.1116 (a) of the Commission's fee schedule which is not at issue here, provides for a fee of ten dollars to be paid with each notification. 47 C.F.R. § 1.1116 (a).

[23] This Court's decisions in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 at 175 (1968), and *United States* v. *Midwest Video Corp.*, 406 U.S. 649 at 659-662 (1972), recognized the Commission's public interest motives through its regulations requiring CATV carriage of local signals, prohibiting duplication of local signals, prohibiting duplication of local programming, restricting the importation of distant signals and mandating origination on certain size CATV systems.

tems by telephone companies,[34] networks and broadcast stations[35] is improper. Such regulations are analogous to the "economic climate" argument put forth by the Federal Power Commission and rejected by the District of Columbia Circuit in *New England Power Co., supra.* (Cert. D-8). It is, in effect, a "competitve climate" argument. Regulations that are designed to keep "entry into the industry open" are not "measurable units of service" as is statutorily required.[36] Under the principle established in *New England Power Co.*, these open entry regulations were clearly enacted to benefit the public, not CATV systems, as identifiable beneficiaries.

The imposition of the Commission's annual CATV fee clearly violates the policy specifically set forth in the Circular which prohibits charging for services "when the identification of the ultimate beneficiary is obscure and the service can be primarily considered benefitting broadly the general public." (A.143-144).

If, as even the Commission admits, the public is the prime beneficiary of the Commission's CATV activities, the public should bear a major portion of the cost of such regulation. The CATV system would continue to share in the burden through payment of the filing, petition and notification fees imposed by the Commission.

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[34] *Report and Order* in Docket 18509, 21 F.C.C. 2d 307 (1970).

[35] *Report and Order* in Docket 18397A, 23 F.C.C. 2d 816 (1970).

[36] The *Clay* decision refers to the Commission's attempts to keep entry to the industry open by regulation designed to prohibit television station ownership of CATV systems in their service area and proposed rules banning newspaper ownership. (Cert. A-17). NCTA did not support the promulgation of either regulation.

C. The Annual CATV Assessment Is Unrelated Both To Providing Any Special Benefit To Any Identifiable CATV system or to the Regulatory Costs Individually Associated With Regulating the System

Even if the Commission's regulation specially benefited some systems in the CATV industry, the annual charge of thirty cents per system subscriber assessed against CATV systems is totally unrelated to any specific service or benefit provided. The classification by the Commission of CATV as an interstate communications facility over which the Commission has *assumed* some jurisdiction is not the related act which justifies the legal imposition of an annual fee.[37] The Commission rationalized in its *Report and Order* that its regulation of CATV requires a major staff unit and that this will constitute recoverable costs (A. 41). Yet the Commission, by "regulating" the CATV industry and thereby incurring costs of regulation cannot automatically pass on that cost in full via the imposition of an annual fee. The Appropriations Act only permits the imposition of fees to make certain agency activities self-sustaining; not automatic fees to make an agency totally self-sustaining.

Under the Commission's approach the CATV annual fees would be levied on a CATV system over which the agency has some jurisdiction even though the system had not filed any request with the Commission or obtained any specific service during the entire year. Typically, most CATV systems paying the annual charge for 1970 never had any specific business before the Commission in that year. And that has continued for each year the fees have been in effect.

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[37] *Report and Order.* (A. 41)

In *Aeronautical Radio, supra,* the fees were limited to the filing of certain types of radio station applications ranging from $2 to $100, *i.e.,* voluntary action of the parties with the fee being directly related to the voluntary act. The Court in *Aeronautical Radio* had no occasion to consider how an annual charge could fulfill the necessary related value or benefit to a specific recipient. Indeed, upon the basis of the record before it, the Court in *Aeronautical Radio* had reason to believe that the Commission was of the opinion that it could not levy such an unrelated annual charge.

In adopting the 1963 schedule of application fees, the Commission stated:

> . . . we firmly believe that an overall reading of Title V firmly supports the contention that the fees are not intended for the support of the government as a whole, but rather as a means of sustaining to the fullest extent feasible those agencies of the government *which bestow special privileges and services upon certain individuals who may apply* for those privileges and services. (emphasis added) *Report and Order,* Docket 14507, *supra,* at 1562-63.

Where an application or pleading is involved, the fee is directly related to a voluntary act. Here the additional annual CATV charges, beyond the filing and application fees, arise out of no voluntary action initiated by the charged company. As in *New England Power Co., supra,* a CATV system pays despite the fact that it had no proceedings before the Commission that year. The formula for the annual fee in that case bore the same lack of relationship to specific services rendered or costs incurred in rendering them. In fact, both methods were based on unrelated economic

criteria; for gas and power companies, the amount of gas delivered or power sold; for CATV systems, the number of subscribers.

It is submitted that the lack of a relationship between benefit or services rendered to a particular CATV system or its cost and the annual payment by individual systems goes beyond the Congressional mandate. It is therefore fatal to the Commission's effort to attain total subsidization via the annual fee.

II. THE ANNUAL CATV FEE SCHEDULE EXCEEDS THE COMMISSION'S AUTHORITY SINCE ITS SOLE PURPOSE IS TO RECOVER THE TOTAL APPROPRIATION FOR CATV REGULATION FROM CATV SYSTEMS WITHOUT REGARD FOR THE CRITERIA SET FORTH IN TITLE V OF THE INDEPENDENT OFFICES APPROPRIATIONS ACT.

A. The Commission Failed to Properly Consider Value to the Recipient in Establishing Its CATV Annual Fee Resulting in an Unreasonable and Arbitrary Schedule of Charges

As has been demonstrated, the directives set forth in the Appropriations Act read in conjunction with the Circular require that for fees to be charged, there must be work, service, benefit, license or similar thing of *value* performed for identifiable recipients. Under the Appropriations Act, fee charges must be fair and equitable taking into consideration value to the identifiable recipient as well as the direct and indirect cost to the Government, public policy or interest, and other pertinent facts. (A. 151)

The statute requires that the agency consider *all* of these criteria. It does not permit the Commission to establish fees by arbitrary redefinition of the criteria, or, in fact, to select just one criterion as the Commission did—the "direct and indirect cost" of the services.

The total maximum fees are governed by the "cost" of the regulation,[38] but the other factors must be used since fair and equitable fees may well total less than the cost of regulation.

NCTA submits that the Commission totally ignored the factor of "value to the recipient" in setting its annual fee schedule and acted arbitrarily and unreasonably without any true concern for the standards established in the Appropriations Act.

The Commission recognized that it was supposed to consider the factor of value in promulgating its new fee schedule when it stated in its *Notice of Proposed Rulemaking* in Docket 18802:

> *Moreover, the rationale for the formulation of the new fee schedule gives explicit recognition, in appropriately varying degrees, to the "value to the*

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[38] NCTA, in its 1970 comments in Docket 18802, attempted to calculate the Commission's cost of regulation of CATV in fiscal year 1971 and the projected revenue from fees using the Commission's estimated figures. Following its calculations, NCTA demonstrated to the Commission that because it had underestimated CATV subscribers and overstated CATV regulatory costs (based on its budget to the Congress) its gross revenues from CATV fees would exceed its cost of regulation by 40%. The Commission ignored these comments and adopted the fee schedule virtually as proposed. On December 27, 1972, the Commission released a *Notice of Proposed Rulemaking* in Docket 19658 (to increase fees), *supra*. In paragraph 5 of the *Notice* the Commission admitted that it had calculated improperly in establishing the 1970 CATV fees. The Commission states:

> Adoption of a cable fee schedule yielding that percentage (88%) rather than full coverage, reflects the Commission's desire *to offset the unintentional inequities resulting from the cable fee schedule basically adopted in 1970 (and currently in force) under which the Commission's actual cable revenue amounted to approximately 200% of cable-regulation budget allocations* . . . (emphasis added)

> *recipient" of the privileges granted,* as well as the public interest served and the direct and indirect cost to the Government. Therefore, in addition to a continuation of the existing concept of a fee upon filing of an application seeking an authorization, *the new fee schedule adopts the concept of a separate fee reflecting our consideration of the "value to the recipient" factor involved in authorizations and licenses. The latter fees are specifically tied to a factor of value* either established by the recipient or graduated according to the generally recognized *technical* and *economic status* of the *licensed* facility being sought or being authorized. (footnote omitted) (emphasis added) (A. 4)

In its *Memorandum Opinion and Order* of April 16, 1970, 22 F.C.C. 2d 452 (1970), the Commission unwittingly admitted its real rationale while stating its reasons for denying access under the Freedom of Information Act to the documents showing "direct and indirect costs":

> Thus, as explained in the *Supplemental Notice* (released March 4, 1970), the Commission has derived a proposed schedule of fees for CATV systems which in the aggregate would return a sum equal to the aggregate operating costs of the Commission in regulating the systems. *The Commission has further determined that these aggregate costs of CATV regulation would be most equitably distributed among the systems primarily by assessing each system with over 200 subscribers* [exemption later removed in the *Report and Order*] *an annual fee of 30 cents per subscriber. Therefore, the derivation of the proposed schedule of fees for CATV systems follows an uncomplicated logic.* (emphasis added) (A. 33)

While the Commission's reliance on the cost factor alone makes the initial formulation of CATV fees un-

complicated, it also violates the spirit and express provisions of the Appropriations Act and the Circular. The criterion of value to the recipient, or special benefit, is so instilled in the concept of "fair and equitable" fees that it may not be disregarded in favor of a theory which says that a regulated industry can be forced to pay fees equal to or exceeding the cost of its regulation, regardless of specific value or benefit to the members of the industry.

If the Commission has considered "value" as a factor in adopting its CATV fees, NCTA submits that it has done so improperly by confusing earnings or "profitability" of the CATV industry with value.

A clearer clue as to the Commission's misdirection in establishing the CATV annual fees is found in the CATV section of its *Notice:*

> This schedule proposes filing fees in generally small amounts for applications, notifications, and petitions filed in the Cable Television Service. The proposed schedule also includes a separate fee reflecting our consideration of the "value to the recipient" factor attendant upon CATV system operation in accordance with our permissive and restrictive rules and regulations and after the filing of notification under Section 74.1105 of our rules. *Since CATV systems provide an interstate communications service upon payment of a charge directly by subscribers, the profitability of CATV systems (i.e., the "value to the recipient" factor) is most readily reflected in the number of customers or subscribers, who directly pay for the provision of such service.* We, therefore, propose to establish an annual fee for CATV systems computed on the basis of the number of subscribers to the service provided by each CATV system. This will provide an equitable distinction amongst

> the fees paid by different CATV systems in accordance with their size. (emphasis added) (A.13)

At the District Court hearing in NCTA's Freedom of Information litigation, it was Commission counsel who finally clarified the Commission's error in explaining the Commission's lack of information used to determine "value to the recipient" for the CATV industry:

> Now, we can adjust ourselves to say and agree with the plaintiff that the community antenna systems have not been under the jurisdiction of the Commission for very long. *And it is true as plaintiff says and we have averred, that we have no information specifically relating to value to the recipient based on reports or documents which had to be filed with the Commission.*
>
> It was at this juncture that Mr. Paglin [Executive Director] and the Commission could understand, or attempt to understand, what plaintiff wanted and said, *"Look, we don't have any documents.* The thing that we took was information we had gotten from your trade association publications. Those documents seemed to indicate to us that the industry last year made x number of dollars." *In the past we have been able to determine what the value to the recipient of the Commission services is by their gross profit or gross intake. If so, we will assume that the gross intake of the community systems is x dollars and that is an indication to us of the value to the community systems.* (emphasis added) (Pet. App. 7a)

In the Freedom of Information suit in the District Court the Commission had refused to provide the documents or information relating to "value to the recipient" on the grounds that they encompassed vast num-

bers of confidential staff memoranda and, that in any event, they could not be identified and assembled without unreasonable expenditures of Commission manpower. In reversing the decision of the District Court in *National Cable Television Association, Inc.* v. *Federal Communications Commission, supra,* the Court of Appeals held that the Commission could not hide behind empty denials and disclaimers. (Supp. App. 6)

The Court found that the Commission's *Notice of Proposed Rulemaking* in Docket 18802 was inadequate on its face for purposes of determining the factors of "value to the recipient" and "direct and indirect cost" for regulating CATV systems, stating:

> After setting forth this generalized explanation of its approach, however, the Commission failed to supply specifics, either as to the facts from which it had reasoned or as to the mechanical steps it had taken in deriving the final schedule. (footnote omitted)
>
> Without data concerning the Commission's costs, it is not possible to determine the basis upon which the Commission allocated its direct and indirect costs among the regulated industries. Without disclosure of the final amount the Commission intended to recover from each industry, it is not possible to determine what, if any, non-cost adjustments were made and whether the final schedule had any relation to the cost allocation. *And without a definition and qualification of "value to the recipient" it is not possible to determine why and how the Commission might be deviating from a pure system of cost allocation. Thus, the Commission insulated itself from external criticism of its method and rationale, leaving nothing open to challenge except the legality of its result.* (emphasis added) (Footnote omitted) (Supp. App. 5-6)

In determining the impropriety of the Commission's wholesale denial of the requested information on value, the court's decision exposed the Commission's less than good faith efforts to comply with the Freedom of Information Act through a combination of inaction, misleading statements and delay.[39]

Throughout its decision the Court of Appeals expresses a concern that the Commission may not have possessed any true basis on the factor of "value to the recipient" to the CATV industry. The claim by the Commission that the documents requested relating to "value" were unidentifiable was viewed with considerable skepticism.

The Court said:

> Where rulemaking proceedings have taken place, the agency has, by definition, already identified its supporting documents, indeed, it would be a most reasonable practice for the agency to retain the documents as a group or index them for future retrieval. *It would be most difficult to rebut the presumption that the agency would be able to produce the documents at least until the validity of its rule has been finally adjudicated in the courts.* (Footnote omitted) (emphasis added) (Supp. App. 17-18)

And further:

> *In the present case the Commission has refused either to state that it did not make use of a mass of financial documents or to identify them.* In fact, the District Court openly invited the former response from the Commission witnesses, but they repeatedly asserted that there was a documentary basis for the Commission's action, although it had

[39] See footnote 11 of the court's opinion. (Supp. App. 7-8)

not been identified in the notices of rulemaking. (footnote omitted) (emphasis added)

* * *

But there remains a substantial factual issue as to whether the Commission relied on trade publications and confidential reports, rather than vague concepts of the profitability of its regulated industries, in preparing its fee schedule. On remand, the Commission should be required to specify by relevant category and sub-category, which—if any—of these materials it used. (emphasis added) (Supp. App. 18-19)

The resulting opinion of the Court, three years after NCTA's original Freedom of Information request, puts in serious doubt whether the Commission, in fact, had or has any factual basis for assessing value beyond conjecture of some CATV systems' profitability. No adequate discussion of its concept of "value" or special benefit has ever been presented by the Commission.[40]

But even if the Commission, in fact, considered "value to the recipient", the law is clear that it cannot define that standard based solely on gross revenues or profitability of the CATV industry, with the single-minded purpose of collecting every dollar of its CATV regulatory cost.

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[40] The Commission, on July 19, 1973, adopted a *Memorandum Opinion and Order,* (F.C.C. 73-784), which denied possession of any information related to value or benefit of its CATV regulation. This candid admission came in response to NCTA's requests of January 11, 1973 and February 23, 1973 for information following the Commission's release on December 27, 1972 of its *Notice of Proposed Rulemaking* in Docket 19658, proposing to increase the CATV annual fee 33⅓ percent to forty cents per subscriber. *Supra,* para. 7.

B. The Proposed Annual Charges Are a Tax Which Can Only be Levied by Congress

NCTA submits that the Commission's new annual fee schedule taken as a whole is defective as an unconstitutional tax on CATV system gross revenues.[41]

In 1963 when it released its *Report and Order* in Docket 14507, *supra*, adopting its filing fee schedule, the Commission rejected arguments which suggested that use taxes should be imposed or that fees should be based on percentage of profits or revenue:

> A tax is imposed upon the party paying it by mandate of the public authorities, without his being consulted in regard to its necessity, or having any option as to its payment. *The amount is not determined by any reference to the service which he receives from the government, but by his ability to pay, based on property or income. On the other hand, a fee is always voluntary, in the sense that the party who pays it originally has, of his own volition, asked a public officer to perform certain services for him, which presumably bestow upon him a benefit not shared by other members of society.* (footnote omitted)
>
> We feel that the proposed charges fall squarely within the court's interpretations as to what constitute fees. While it may possibly be argued that the provision of Title V calling for the payment of the amounts collected in fees into the Treasury as miscellaneous receipts is descriptive of a tax, *we believe that an overall reading of*

[41] Congress was careful to make the critical distinction between a "fee" and a "tax". A fee bears a reasonable relationship to the extent and nature of services rendered and the benefits received beyond those received by the public generally. *Hanson* v. *Griffith*, 124 N.Y.S. 2d 473, 204 Misc. 736, *aff'd*, 127 N.Y.S. 2d 819, 283 App. Div. 662 (1953); *Smith* v. *Carbon County*, 90 Utah 560, 63 P. 2d 259, 262 (1936). Statutory and regulatory authority permit the imposition of fees, not taxes.

> *Title V firmly supports the contention that the fees are not intended for the support of the government as a whole, but rather as a means of sustaining to the fullest extent feasible those agencies of the government which bestow special privileges and services upon certain individuals who may apply for those privileges and services.* (emphasis added) *Supra,* at 1559, 1563.

The Commission's fees in 1963 were limited to the filing of applications by a licensee, *i.e.,* voluntary actions of the parties with the fee being directly related to the voluntary act. Now the additional annual charges arise out of no voluntary action initiated by the charged company. The new CATV fee schedule changes the basis from a filing fee system to a system based almost entirely on gross revenues.

Recently, in May 1973, Dean Burch, Chairman of the Commission, responded by letter to inquiries made at the hearings on the agency's 1973-74 fiscal year appropriations request by Senator William Proxmire, Chairman of the Subcommittee on HUD, Space, Science and Veterans.[42]

The first of the three questions asked of the Commission was as follows:

> (1) Is there merit to the idea that broadcasters in return for their exclusive use of a valuable "public property" (a leasehold, in effect, on a portion of the radio spectrum), should be assessed an annual levy on profits substantially in excess of the present F.C.C. fee schedule?

The Commission's response belies its conduct in imposing the CATV annual fee schedule.

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[42] This subcommittee has jurisdiction over the Commission's appropriations, in the United States Senate.

The Commission responded in part, as follows:

> ASSESSMENT ON BROADCASTERS' PROFITS. It goes without saying, of course, that broadcasters are subject to the same federal, state, and local taxes (on income and property) as all other private entrepreneurs. With respect to some special assessment on after-tax profits, the first problem arises in determining the base-line against which these profits should be measured in order to arrive at a valid approximation of the going rate of return . . . .
>
> Additionally, some 25 per cent of all broadcast stations recorded net losses that year. There simply is no way to state that broadcasters as a class enjoy "X" per cent profits or "Y" per cent profits or, indeed, any profits at all, and rule making in this area would thus be a matter of the greater complexity.
>
> Rule making is in any case the wrong term. *What is involved here, clearly, is a form of taxation—and the F.C.C. has no taxing powers nor should it, in our view, have such powers. This is a matter for Congressional action alone. Should the Congress wish to explore this question further, we would of course be prepared to supply whatever additional data might be required.* (Emphasis added) Senate Hearings Before the Committee on Appropriations on HUD, Space, Science, Veterans and Certain Other Independent Agencies Appropriations, Part 2, 93rd Cong., 1st Sess. 1338-39.

The Commission recognizes that it is for Congress to decide whether the Commission should have authority to levy an annual industry-wide tax based on the industry's revenues in general. But the Congress has not done so. The Congress has not delegated, ex-

pressed or implied, the authority that justifies such an assessment.

The CATV systems' annual fee is determined not by proper benefit or value related to the assessment, but upon the number of subscribers and hence upon the systems' gross receipts. The Commission, in its *Report and Order,* defends the uniformity of its formula on the grounds "that subscription rates tend to cluster at about $5.00 per month or a bit higher." (A. 65)

The Commission's yearly assessment is a $.30 cent tax on the annual revenue from each CATV system subscriber. The Commission uses the base of $5.00 a month and $60.00 a year to determine the tax rates. Thus, such an annual charge, argues the Commission, "appears to constitute in the typical case only one-half of one per cent of CATV gross revenues from subscription fees, if that much" and "that in view of the smallness, alternative formulas . . . are unnecessary."[43]

The Commission's statements in 1963 and before the Senate Appropriations Committee this year recognize the characteristics of the CATV annual fee as a tax. Yet the goal of total subsidization of the cost of its regulation has overshadowed all legal principles in the promulgation of the annual CATV fee schedule.

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[43] A small CATV system of 2,000 subscribers, apart from any application fees, would pay $600 per year in annual fees. Larger systems operating in the top 100 markets on local signals like San Diego or New York City already are paying upwards of $20,000 in annual assessments. These are hardly minimal fees. As the Commission's per subscriber fees increase, as the Commission has proposed, and as city systems mature, annual fees of over $100,000 will not be unusual.

Applying the standards of the Appropriations Act to the Commission's annual fee CATV schedule, it is readily apparent that the assessment in both form and substance is an illegal tax.

CONCLUSION

For the foregoing reasons, the National Cable Television Association, Inc. requests that this Court reverse the decision of the Court of Appeals for the Fifth Circuit as to the Federal Communications Commission's authority to levy an annual fee on the CATV industry in its 1970 *Report and Order* in Docket 18802.

Respectfully submitted,

STUART F. FELDSTEIN
CHARLES S. WALSH
STEPHEN A. GOLD
918 16th Street, N.W.
Washington, D.C. 20006
Attorneys for National Cable Television Association, Inc.

APPENDIX

APPENDIX

APPENDIX A

NATIONAL CABLE TELEVISION ASSOCIATION
918 16th St., N. W.
Washington, D. C. 20005
March 2, 1970

Mr. Max D. Paglin
Executive Director
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

Dear Mr. Paglin:

Pursuant to Section 0.461(a) of the Commission's Rules and Regulations, the National Cable Television Association, Inc. (NCTA) requests the right to inspect the annual and inventory reports of all user charges of the Commission submitted to the Bureau of the Budget on Standard Form No. 4 on or about September 30, 1969. In addition NCTA requests the right to inspect documents of the Commission which were used to prepare the Standard Form No. 4 report.

NCTA also requests the right to inspect the Commission's budgetary request for fiscal year 1971, beginning, July 1, 1970, which was submitted to the current session of Congress, including supportive documents used to arrive at the figures included in this request. NCTA further requests the right to inspect the Commission's budgetary requests for fiscal years 1970, beginning July 1, 1969, and 1969, beginning July 1, 1968.

NCTA also requests the right to inspect documents used by the Commission in determining the proposed fee schedules set forth in the Notice of Proposed Rule Making, Docket 18802, released February 19, 1970. In particular, NCTA requests the right to inspect the documents and the listings or records used to determine the "'value to the recipient' of the privileges granted" and "the direct

and indirect cost to the Government" of granting and administering those privileges as referred to in paragraph 5 of the Notice of Proposed Rule Making, Docket 18802.

The right to inspect these materials is granted under the Public Information Act of 1966 as amended, 5 U.S.C. Section 552, which provides that:

> (a)(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person.
>
> (c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

The materials for which NCTA has requested inspection rights do not fall within any of the categories of materials exempt from inspection outlined by Subsection (c) of the Public Information Act of 1966, as amended, 5 U.S.C. Section 522, and by Section 0.457 of the Commission's Rules and Regulations. Because the Commission is not required to withhold these items from public inspection, the Commission has authority to make these requested items available pursuant to Sections 0.451(b)(3) and 0.465 of the Commission's Rules and Regulations.

NCTA is interested in inspecting the above-mentioned items. NCTA is the only national trade association of the cable television (CATV) industry. As such, it represents a substantial number of CATV system operations in the United States and has appeared in many Commission

proceedings affecting the CATV industry, and intends to Comment in the Commission's Docket 18802.

On February 19, 1970, the Commission released a Notice of Proposed Rule Making, Docket 18802, regarding a proposed fee schedule which includes fees to be exacted from CATV system operators who have heretofore not been subject to fees for Commission regulation. In this Notice the Commission stated that the imposition of fees is made pursuant to Executive and Congressional directives that the fees is made pursuant to Executive and Congressional directives that the fee structure fully support the Commission's activities. The Commission further stated that "the schedule being proposed herein reflects estimated fee revenues which generally approximate our budgetary request for fiscal year 1971, beginning July 1, 1970." (Notice of Proposed Rule Making, Docket 18802, par. 4) This proposed fee schedule allegedly is based upon "the direct and indirect cost to the Government" of the work and services performed by the Commission and upon the "value to the recipient of the privileges granted" by the Commission. (Supra, par. 5).

Comments by parties interested in this rule making proceeding must be submitted to the Commission by April 20, 1970. In order to prepare fully informed, relevant and timely comments in this proceeding, it is imperative that NCTA be able to inspect the Commission records directly related to the Commission's cost in granting and administering privileges and the Commission's basis for determining the value of the privileges granted. This relevant information is contained in the documents for which NCTA has requested the right of inspection. NCTA is prepared to pay any of the costs involved pursuant to Sections 0.465 and 0.466 of the Commission's Rules and Regulations.

In conclusion, NCTA requests the right to inspect the annual and inventory reports submitted to the Bureau of the Budget on Standard Form No. 4 on or about September

30, 1969, the supportive documents used in preparing Standard Form No. 4, the Commission's budgetary request to the current session of Congress for fiscal year 1971, commencing July 1, 1970, the Commission's budgetary requests to Congress for fiscal years 1970, commencing July 1, 1969, and 1969, commencing July 1, 1968, and the documents pertaining to the value of privileges granted by the Commission and the direct and indirect costs to the Commission of granting and administering such privileges which are the basis for the fee schedule proposed in Docket 18802.

Very truly yours,

/s/ GARY L. CHRISTENSEN

/sa

APPENDIX B

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In Reply Refer To:
3400

National Cable Television Association
918 16th Street, N. W.
Washington, D. C. 20006

Attention: Gary L. Christensen, Esquire
General Counsel

Gentlemen:

This is in reply to your March 2, 1970, letter requesting permission under 47 CFR 0.461(a) to inspect the Commission records referred to below. The stated purpose of the request is to obtain information useful in preparing your comments on the Commission's Notice of Proposed Rule Making, in Docket 18802 (released February 19, 1970), which proposes to alter the Commission's schedule of fees.

Your letter initially requests the right to inspect the annual and the inventory reports of all user charges of the Commission submitted to the Bureau of the Budget on Standard Form No. 4 on or about September 30, 1969. The annual report was prepared solely at the direction of the Bureau of the Budget CircularA-25-Supplement 1. This interagency report is regarded as the property of the Bureau of the Budget, and your request would more appropriately be directly to the Bureau of the Budget itself. See 47 CFR 0.451(b)(3). In light of the foregoing, it would be improper to grant your secondary request to inspect the Commission staff's working papers in support of the annual report. On the other hand, the inventory of user charges is nothing more than a schedule of fees, and the Commission's schedule is set forth in Part 1, Subpart G, of the Rules, 47 CFR 1.1101 *et seq.*

Your letter further requests the right to inspect the Commission's budgetary requests for the fiscal years 1969, 1970, and 1971. These budgetary requests were prepared at the direction of the Bureau of the Budget, and what has been said above concerning annual reports of user charges is equally applicable here. However, as you may not be aware, budgetary information for fiscal years 1969, 1970, and 1971, is contained in *Budget of the United States Government—1971,* which is available to you from the Superintendent of Documents.

Finally, your letter requests the right to inspect the documents used in determining "the direct and indirect cost to the Government" and the " 'value to the recipient' of the privileges granted" as set forth in the Notice in Docket 18802. With respect to "the direct and indirect cost to the Government," we note that your letter was submitted before the March 4, 1970, release of the Commission's *Supplemental Notice* (FCC 70-239). Since the *Supplemental Notice* contains information as to the costs of the Commission's various activities, a copy thereof is enclosed herewith. With respect to the " 'value to the recipient'

of the privileges granted," the Commission and its staff relied upon their knowledge of the financial aspects of the communications industry acquired over the years from vast numbers of confidential financial statements, confidential staff memoranda, and various trade publications. Consequently, your blanket request to inspect all of this information must be denied because it cannot be identified and assembled without totally unreasonable expenditures of Commission manpower.

Sincerely yours,

/s/ MAX D. PAGLIN
Executive Director

Enclosure

APPENDIX C

Pages D1-D3 of this appendix (taken from pages 7-9 of hearing transcript) sets forth the argument by Commission counsel, Mr. Robert Werdig, Jr., in support of the Commission's motion to dismiss or for summary judgment before the United States District Court for the District of Columbia on June 11, 1970, in *National Cable Television Association, Inc.* v. *Federal Communications Commission*, C.A. No. 1331-70.

7 to each service it performed.

We submit, therefore, that the plaintiffs do have the information that they requested relative to direct and indirect costs.

Furthermore, it is plain to see that the figures set out in the supplemental notice are no more than a breakdown by service of the Commission's current budget request. The underlying information, should such be needed, must be included in the prior documents we have discussed.

We therefore, submit that Item 7(b) has been provided, which leaves us with (7)(a), to wit, the documents, listings or records used to determine the value to the recipient.

The plaintiff contends that the Commission has switched its position since plaintiff originally asked for these documents. The Commission would tender to the Court the proposition that in the original letter of request of March the 2nd, it was reasonable to assume—inasmuch as there was no specificity in the request—that what plaintiff wanted was the records which the Commission had used to determine value to the recipient of every service provided, broadcast, community, common services, emergency services, everything. It was later, as we see in the affidavit of Mr. Christensen and in the petition for review filed by the plaintiff with the Commission, that they weren't really interested in value to the recipient

8 of every segment of the communication's industry but were only interested in how the Commission arrived at value to the recipient of the community antenna industry.

Now, we can adjust ourselves to say and agree with the plaintiff that the community antenna systems have not been under the jurisdiction of the Commission for very long. And it is true, as plaintiff says and as we have averred, that we have no information specifically relating to value to a recipient based on reports or documents which had to be filed with the Commission.

It was at this juncture that Mr. Paglin and the Commission could understand or attempt to understand what plaintiff wanted and said, "Look, we don't have any documents. The thing that we took was information we had gotten from your trade associations publications. Those documents seemed to indicate to us that the industry last year made x number of dollars. In the past we have been able to determine what the value to the recipient of Commission services is by their gross profit or their gross intake. If so, we will assume that the gross intake of the community systems is X dollars, and that is an indication to us of the value to the community systems."

As Your Honor well knows—

THE COURT: Excuse me. Where do they get the X dollars, from trade publications?

MR. WERDIG: Yes, Your Honor. That's the only place.

9 available. They don't have any information submitted to them except—and I believe we admitted in our motion—that there have been some documents submitted in various hearings before the Commission in which information has been provided about the operations of the community and some systems.

THE COURT: Are those available to the plaintiff?

MR. WERDIG: They made them up; they must be.

THE COURT: These are not documents complied by the Commission?

MR. WERDIG: No, Your Honor. They were documents that were submitted to the Commission.

THE COURT: They were complied by people attending a hearing befored the Commission?

MR. WERDIG: Correct.

We further want to explain to the Court that when Mr. Paglin made the statement in his letter to the plaintiff regarding the vast materials, confidential memorandum, inter-agency notes and things, this was a prepositional phrase which modified the words "knowledge acquired over the years."

Mr. Paglin told the plaintiff that when the staff devised its proposed schedule, it arrived at its proposed rate based upon its knowledge which it had acquired over the years in the communication industries from these various documents which do not particularly relate to the plaintiff because there are no documents in the Commission's control that have been